ADIB MOKHTAR & ORS

v.

JASON CHAN CHEE KHONG & ANOR

HIGH COURT MALAYA, IPOH
CLEMENT SKINNER J
[CIVIL SUIT NO: 22-6-1998]
20 FEBRUARY 1999

CIVIL PROCEDURE: *Pleadings - Statement of claim - What it must contain - Sufficiency of pleaded facts - Whether sufficient to maintain action - Whether statement of claim deficient - Whether could be made good by affidavit evidence - Whether action could be struck out under O. 18 r. 19 Rules of the High Court 1980*

CIVIL PROCEDURE: *Pleadings - Statement of claim - Claim by 1st & 2nd plaintiffs for loss and damage due to caveat entered on land - Whether 1st & 2nd plaintiffs entitled to claim as they were not owners of land - Whether entitled in view of loan granted to purchase land - Promise by borrower to develop land to repay loan - Whether created an equitable interest in favour of 1st & 2nd plaintiffs*

In this suit, the plaintiffs sued the defendants in respect of loss and damage suffered estimated at RM10 million as a result of a caveat lodged by the defendants on a piece of Malay reserve land ('the land'). The said caveat had since been removed on the application by the plaintiffs.

The defendants objected to the claim of the 1st and 2nd plaintiffs as they were not the owners of the land. The owners were the 3rd and 4th plaintiffs who had purchased undivided shares in the land.

The 1st and 2nd plaintiffs brought their claim by virtue of the fact that the 2nd plaintiff, a company in which the 1st plaintiff was the director, had lent money to the 3rd plaintiff to enable the latter to purchase his part of the undivided shares in the land. Also, that the promise by the 3rd plaintiff to develop the land so as to repay the loan taken created an equitable interest pursuant to s. 206(3) of the National Land Code 1965 ('NLC'). The defendants applied to strike out the claim of the 1st and 2nd plaintiffs which was dismissed by the deputy registrar. Hence, the instant appeal.

Held:

[1] The basic purpose of O. 18 r. 7(1) is to enable a defendant to know what it is that a plaintiff alleges against him. Thus, the plaintiff is obliged to state facts sufficient to formulate a complete cause of action.

[2] The statement of claim only shows that the 3rd and 4th plaintiffs were owners of the land and no facts were pleaded to show that the 1st and 2nd plaintiffs had any rights or interest in the land adversely affected by the defendants' caveat. Likewise, no facts were pleaded to show that the 1st and 2nd plaintiffs were involved or interested in any way with the development of the land so that the alleged deferment of the development plans had adversely affected the 1st and 2nd plaintiffs.

[2a] Apart from pleading that the 1st plaintiff was a director of the 2nd plaintiff, no other facts were pleaded to show why that office entitled him to bring this action in his personal capacity against the defendants for having lodged a caveat against the land or how that office entitled him to claim an interest in the land or the development project planned thereon. Also, no facts were pleaded to show why the granting of the loan by the 2nd plaintiff to the 3rd plaintiff entitled the 2nd plaintiff to bring this action against the defendants for lodging the caveat against the land.

[2b] Thus, as far as the 1st and 2nd plaintiffs were concerned, the statement of claim failed to state facts sufficient to show any cause of action against the defendants and was to that extent deficient.

[2c] As the application to strike out is made under sub-r. (a), (b) and (d) of O. 18 r. 19(1) of the RHC, the parties are not precluded from referring to affidavit evidence to make good the said deficiency.

[2d] However, there is a consistent line of authorities that indicate that an omission or defect in a statement of claim cannot be made good by affidavit evidence. This rule has been applied in applications under O. 18 r. 19 of the RHC. The purpose of the rule is to enforce a basic rule of pleading, namely, that a defendant is entitled to know from the outset what the claim is against him.

[2e] Further, the rule is applied to prevent the very object of pleadings in O. 18 r. 7(1) from being rendered nugatory thereby opening the way to vexatious litigation and abuse of process whereby claims or defences may be simply filed without the opposing party really knowing what is truly alleged until a challenge is mounted and only then being supplied with the facts.

[3] The grant of a loan simpliciter will not create a beneficial interest in the land in favour of the 2nd plaintiff. Something more must be shown, for eg, that the loan was granted to the 3rd plaintiff to purchase the land on behalf of both the 1st and 2nd plaintiffs.

[4] A promise by the 3rd plaintiff to develop the land so that it could repay the loan taken from the 2nd plaintiff did not create an equitable interest in the land in favour of the 2nd plaintiff by virtue of s. 206(3) of the NLC. No facts were pleaded to show that any transaction had been entered into between the 2nd plaintiff and the 3rd plaintiff whereby it could be said that the 2nd plaintiff had acquired any form of interest in the land.

[5] An application to strike out under O. 18 r. 19 of the RHC although should be made promptly can generally be made before pleadings are closed. Further, the application by the defendants made 18 days after the defence was filed was not inordinate delay.

[Appeal allowed and order of deputy registrar set aside. Claim of 3rd and 4th plaintiffs intact.]

Cases referred to:

Bruce v. Odhams Press, Ltd [1936] 1 KB 712 ***(refd)***

Hsu Seng v. Chai Soi Fan [1990] 1 MLJ 303 ***(refd)***

Jamir Hassan v. Kang Min [1991] 3 CLJ 2490 ***(refd)***

Kang Kok Kwong v. Bukit Baru Centre Sdn Bhd & 4 Ors [1991] 1 CLJ 343 ***(refd)***

Pernas Sime Darby Holdings Sdn Bhd v. M Poovanandran [1986] 1 MLJ 418 ***(refd)***

Stamford Holdings Sdn Bhd v. Kerajaan Negeri Johore & Ors [1998] 1 CLJ 960 ***(refd)***

UMBC v. Palm & Vegetable Oils [1983] 1 MLJ 206 ***(refd)***

UMW (Sarawak) Sdn Bhd v. Kim Leong Timber Sdn Bhd & Ors [1989] 3 MLJ 177 ***(refd)***

Legislation referred to:

National Land Code 1965, s. 206(3)

Rules of the High Court 1980, O. 14, O. 18 rr. 7(1), 19, 19(1), (a), (b), (d)

For the plaintiffs - Nantham; M/s Nantham V & Partners
For the defendants - Chan Yoke Meng; M/s Kula & Assoc

Reported by Usha Thiagarajah

JUDGMENT

Clement Skinner J:

Decision

This appeal raises two rather basic but essential points concerning pleadings. Firstly, in instituting proceedings against another, what must a plaintiff show in his pleadings to enable him to bring and maintain an action. Secondly, if the statement of claim is found to be lacking or deficient, can affidavit evidence make good such deficiency. There are four plaintiffs in this suit but objection has been taken only against the claim of the 1st and 2nd plaintiffs. For convenience, I shall therefore continue to refer to the appellants as the defendants and to the respondents as the 1st and 2nd plaintiffs in this appeal.

The facts of this case are as follows. The 3rd plaintiff, a company duly incorporated with limited liability, is the owner to the extent of 23/32 undivided shares in a piece of Malay reserve land in Kuah, Langkawi, Kedah (hereinafter the said land). The 4th plaintiff, an individual, is the owner of 9/32 undivided shares in the said land. The 1st plaintiff, an individual, is a director of the 2nd plaintiff which is a company duly incorporated with limited liability. The 2nd plaintiff is said to have lent RM900,000 to the 3rd plaintiff to enable the latter to purchase the undivided shares in the said land and agreed to repay the 2nd plaintiff RM1,200,000 by 7 November 1997. The 3rd plaintiff intended to develop the said land into a hotel cum, office complex and has obtained approval for that purpose from the local authorities. The 1st and 2nd defendants are individuals who claim to have been directors of the 3rd plaintiff but who were allegedly wrongfully removed as such directors. To protect their alleged interest, the defendants lodged a caveat against the whole of the said land as a result of which the plaintiffs claim the development of the said land had to be deferred causing them loss and damage, quantified at RM10 million. The plaintiffs have since applied for and obtained the removal of the defendants' caveat against the said land. The plaintiffs now bring this suit in respect of the alleged loss suffered.

On 28 October 1998 the defendants applied to strike out the claim of the 1st and 2nd plaintiffs, under O. 18 r. 19(1) Rules of the High Court (RHC) as disclosing no cause of action or that it is scandalous, frivolous or vexatious

or is otherwise an abuse of the process of the court. The application was heard by the deputy registrar but dismissed. Hence this appeal.

The statement of claim is to be found specially endorsed on the writ of summons. Order 18 RHC deals with pleadings generally and by r. 7(1) provides that:

> Subject to the provision of this rule and rules 10, 11 and 12, every pleading must contain, and contain only, a statement in summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which these facts are to be proved, and the statement must be as brief as the nature of the case admits.

In *Bruce v. Odhams Press, Ltd* [1936] 1 KB at p. 712, Scott LJ said:

> The word 'material' means necessary for the purpose of formulating a complete cause of action, and if any one 'material' fact is omitted, the statement of claim is bad.

It should hardly need stating then that the basic purpose of O. 18 r. 7(1) is to enable a defendant to know what it is that a plaintiff alleges against him and in doing so, the plaintiff is obliged to state facts sufficient to formulate a complete cause of action.

It will be seen from a reading of the statement of claim that this whole action arises out of the defendants having lodged a caveat against the said land. Paragraph 9 of the statement of claim states that as a result of the caveat, development of a hotel cum office complex on the 23/32 undivided shares of the said land had to be deferred as a result of which the plaintiffs sufferred financial losses and damages.

However, the statement of claim shows that only the 3rd and 4th plaintiffs are owners of the said land and no facts have been pleaded to show that the 1st and 2nd plaintiffs claim any right or interest, whether beneficial or otherwise, in the said land and which rights or interest have been adversely affected by the defendants' caveat. Likewise, in respect of the development on the said land, no facts have been pleaded to show that the 1st and 2nd plaintiffs were involved or interested in any way with such development so that the alleged deferment of plans to develop the said land has adversely affected the 1st and 2nd plaintiffs.

On what basis then do the 1st and 2nd plaintiffs bring this claim? In so far as the 1st plaintiff is concerned, it is pleaded that he is a director of the 2nd

plaintiff. Assuming this to be so, no other facts have been pleaded to show why that office entitles him to bring this action in his personal capacity against the defendants for having lodged a caveat against the said land or how that office entitles him to claim an interest in the said land or the development project planned thereon.

As regards the 2nd plaintiff, para. 7 of the statement of claim shows it lent RM900,000 to the 3rd plaintiff company who agreed to repay to the 2nd plaintiff RM1,200,000 on or before 7 November 1997. Nothing more is stated about the loan. No facts have been pleaded to show why the granting of a loan would entitle the 2nd plaintiff to bring this action against the defendants for lodging the caveat against the said land. If at all, what the pleaded facts show is that the 2nd plaintiff have a cause of action against the 3rd plaintiff for failure to pay RM1,200,000 by 7 November 1997 as promised.

Thus, from what is pleaded by the 1st and 2nd plaintiffs, I have no difficulty in holding that the statement of claim has failed, in so far as it concerns them, to state facts sufficient to show any, let alone formulate a complete cause of action against the defendants and is to that extent deficient.

The question that next arises is whether the deficiency referred to above can be made good by affidavit evidence. The application to strike out is made under sub-r. (a), (b) and (d) of O. 18 r. 19(1) RHC and therefore the parties are not precluded from referring to affidavit evidence.

The 1st and 2nd plaintiffs have filed an affidavit to oppose the striking out application. It was affirmed by the 1st plaintiff on 7 September 1998 and filed herein on 8 September 1998 (hereinafter the 1st plaintiff's affidavit)

It is this affidavit that reveals the basis upon which the 1st and 2nd plaintiff's claim is brought. Paragraph 7 of the 1st plaintiff's affidavit states that the 2nd plaintiff gave the said loan to the 3rd plaintiff to pay for the cost of the said land. The 1st plaintiff then avers that "I have an interest in the said suit to protect my interest and the interest of the 2nd plaintiff who has the beneficial interest on the land registered in the name of the 3rd plaintiff". The 1st plaintiff goes on in para. 10 of the said affidavit to aver that "the 1st and 2nd plaintiffs have the beneficial interest to the land and have been rightly cited as a party to the suit."

It is obvious from the contents of the 1st plaintiff's affidavit that the 1st and 2nd plaintiffs seek to claim a "beneficial" interest in the said land because the 2nd plaintiff gave a loan to the 3rd plaintiff to purchase the said land. As I have said, this was not pleaded in the statement of claim.

There has been a consistent line of authorities to the effect that an ommission or defect in a statement of claim cannot be made good by affidavit evidence. In *UMBC v. Palm & Vegetable Oils* [1983] 1 MLJ 206, the Federal Court in considering an appeal arising from an application for summary judgment under O. 14 RHC stated per Raja Azlan Shah Ag LP (as His Highness then was) that:

> we cannot but observe that any defect or omission in the statement of claim cannot be made good by affidavit evidence: *Gold Ores Reduction Co. v. Parr* where Mathew J., said that 'it is most important that a defendant should know from the writ what the claim against him is.'

What was stated in *UMBC v. Palm & Vegetable Oils* has been applied in the following cases:

In *Pernas Sime Darby Holdings Sdn Bhd v. M Poovanandran* [1986] 1 MLJ 418, Zakaria Yatim J, (as he then was) in striking out a defence under O. 18 r. 19 on the ground that it was a sham, refused to consider an affidavit filed to improve the statement of defence.

In *UMW (Sarawak) Sdn Bhd v. Kim Leong Timber Sdn. Bhd. & Ors* [1989] 3 MLJ 177, Haidar J (as he then was) refused to grant summary judgment on an O. 14 application against a defendant because the plaintiff did not plead sufficient facts to entitle the plaintiff to claim a right created by statute. The learned judge refused to allow the plaintiff to rely on an affidavit filed for the purpose of improving the statement of claim.

In *Hsu Seng v. Chai Soi Fan* [1990] 1 MLJ 303, Haidar J (as he then was) in allowing an O. 18 r. 19 application to strike out a defence, refused to allow the defendant to make good omissions in the defence by affidavit evidence.

In *Kang Kok Kwong v. Bukit Baru Centre Sdn Bhd & 4 Ors* [1991] 1 CLJ 343 Dato' Wan Adnan bin Ismail J (as his Lordship then was) struck out the writ and statement of claim against four out of five defendants under O. 18 r. 19 and in doing so held that the statement of claim did not disclose any complaint against the four defendants and an affidavit sworn to make allegations which were not made in the statement of claim could not make good the omission in the statement of claim.

I have referred to the above cases to show that although the rule that affidavit evidence cannot make good an omission in a statement of claim or defence finds its origins in cases involving applications for summary judgment under O. 14 RHC, it has also been applied without hesitation in application under O. 18 r. 19 RHC.

I respectfully agree with the above cases in their application of the rule, especially in relation to O. 18 r. 19(1) RHC applications. For myself, I see no reason to restrict the application of the rule to applications for summary judgment only. It is my view, that the purpose of the rule is to enforce a basic rule of pleading, namely, that a defendant is entitled to know from the outset what the claim against him is. If that be so, it should not make a difference whether the attack to the statement of claim arises in an O. 14 RHC or O. 18 r. 19(1) RHC situation. A further reason for applying the rule in O. 18 r. 19(1) RHC situations is to prevent the very object of pleadings as found in O. 18 r .7(1) from being rendered nugatory thereby opening the way to vexatious litigation and abuse of process whereby claims or defences may be simply filed without the opposing party really knowing what is truly alleged until a challenge is mounted and only then being supplied with facts.

For the above reasons I hold that the matters stated in the affidavit of the 1st plaintiff cannot be relied upon to make good the omissions in the statement of claim so as to clothe the 1st and 2nd plaintiffs with a cause of action against the defendants.

If I am wrong in what I say above and I am obliged to consider the contents of the 1st plaintiff's affidavit, I find that what is stated therein do not remedy the omissions in the statement of claim for reasons that follow.

As far as the 1st plaintiff is concerned, it should be noted that it is the 2nd plaintiff that gave the loan to the 3rd plaintiff. The 1st plaintiff is only a director in the 2nd plaintiff yet by para. 7 and 10 of his affidavit he claims an interest in the suit and a beneficial interest in the said land. However, apart from the bare assertions made, no facts have been stated to show how that interest arises or what enables the 1st plaintiff to bring this suit in his personal capacity. It was stated in submissions by learned counsel for the 1st plaintiff that as a director of the 2nd plaintiff, he has control of the 2nd plaintiff and has to safeguard the affairs of the 2nd plaintiff. It was also said that the 2nd plaintiff has authorised the 1st plaintiff to sue, but without any averment in the 1st plaintiff's affidavit to the above effect. Even assuming all what is said is correct, I find those facts still do not disclose any cause of action against the defendants.

As regards the 2nd plaintiff, the affidavit states that the 2nd plaintiff claims a beneficial interest in the said land because it granted a loan to the 3rd plaintiff to purchase the land. To me, the grant of a loan simpliciter will not, without more, create a beneficial interest in the said land in favour of the 2nd

plaintiff. Something more must be shown, for example, that the loan was granted to the 3rd plaintiff to purchase the said land on behalf of both the 1st and 2nd plaintiffs.

Although not stated in the statement of claim or in the 1st plaintiff's affidavit, it was argued by learned counsel for the 1st and 2nd plaintiffs during submissions that as the 3rd and 4th plaintiffs had promised to develop the said land and repay the said loan, this created an interest in the said land in favour of the 2nd plaintiff by virtue of the operation of s. 206(3) National Land Code (NLC). With respect, I do not see how a promise by the 3rd plaintiff to develop the said land so that it can repay a loan taken from the 2nd plaintiff would attract the provisions of s. 206(3) NLC to create an equitable interest in the said land in favour of the 2nd plaintiff. As I observed earlier, no facts have been pleaded to show that any transaction has been entered with between the 2nd plaintiff and the 3rd plaintiff whereby it can be said that the 2nd plaintiff had acquired any form of interest in the said land. I therefore hold that s. 206(3) NLC does not afford the 2nd plaintiff any cause of action against the defendants.

For completeness, I wish to deal with an objection by learned counsel for the 1st and 2nd plaintiffs that the defendants did not come to court promptly with their application. I do not agree. The application was made 18 days after the defence was filed and therefore before the pleadings were deemed to be closed. In the case of *Jamir Hassan v. Kang Min* [1991] 3 CLJ 2490; [1992] 2 MLJ 46, it was held that whereas an application to strike out under O. 18 r. 19 should be made promptly, it can generally be made before pleadings are closed. In any event, in the circumstances of this case, I do not consider a period of 18 days as inordinate delay. I therefore find this objection is without merit.

In opening his submissions, learned counsel for the plaintiffs pointed out that the summary jurisdiction of the court to strike out under O. 18 r. 19 should be exercised only in plain and obvious cases and referred to the case of *Stamford Holdings Sdn. Bhd. v. Kerajaan Negeri Johore & Ors.* [1998] 1 CLJ 960 where the Court of Appeal per Ahmad Fairuz JCA stated that "so long as the statement of claim discloses some ground of action the mere fact that the plaintiff is not likely to succeed on it at the trial is no ground for it to be struck out".

For all the reasons given above, I find this is a plain and obvious case for striking out. The claim of the 1st and 2nd plaintiffs is patently unsustainable. To me, for the 1st and 2nd plaintiffs to have brought this action and to claim

a sum of RM10 million as liquidated damages without having any cause of action against the defendants is not only frivolous and vexatious but constitutes an abuse of process and their claim must be struck out which I now do with costs. The defendants appeal is accordingly allowed and the order of the deputy registrar is set aside. The claim of the 3rd and 4th plaintiffs of course remains intact.